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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE MARQUIS ROGERS, Defendant and Appellant.	C087021 (Super. Ct. No. 16FE023618)

A jury found defendant DeAndre Marquis Rogers guilty of being a felon in possession of a firearm, with a gang enhancement, and the trial court found true two prior serious felony convictions that qualified as "strikes." He was sentenced under the three strikes law to an aggregate term of 30 years to life (25 years to life plus a consecutive five-year prior serious felony enhancement).

On appeal, defendant argues that (1) there is insufficient evidence to support a conviction for possession of a firearm; (2) the indeterminate term imposed violates the

prohibition against cruel and unusual punishment; (3) we should strike his indeterminate sentence if we find, in a separate appeal, that one of defendant's strike convictions should be reversed; and (4) this matter should be remanded so that the trial court may exercise its discretion whether to strike the prior serious felony enhancement under newly enacted Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2). We agree that the matter should be remanded for the limited purpose of allowing the trial court to consider whether to strike the five-year prior serious felony enhancement. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 15, 2016, at approximately 4:00 p.m., law enforcement officers were called to investigate a 911 call from a female, G.K., reporting that she had been involved in a domestic dispute with defendant. G.K. reported that defendant was carrying a handgun.

Law enforcement officers began tracking defendant, who was on parole, using the GPS monitoring bracelet he was wearing. Officers followed defendant, first to a house belonging to the family of a deceased gang member, and then to a sushi restaurant. Defendant entered the restaurant and stayed inside for about an hour before coming out and standing next to an Infiniti SUV. Officers watched defendant open the right passenger door of the Infiniti and lean in as if he were manipulating something.

About this time, a Mercedes sedan pulled up behind the Infiniti. M.D., a female friend of defendant, was the owner of the Mercedes and was driving the vehicle. N.T., another female friend of defendant, was sitting in the front passenger seat. Both M.D. and N.T. are closely associated with members of the G-Mobb gang.

As the Mercedes approached, defendant walked over to the car and leaned in the driver's side window. Defendant then briefly went back into the restaurant. When he re-emerged, defendant got into the rear seat of the Mercedes on the driver's side. Because

the windows of the car were tinted, officers could not see what defendant was doing inside.

With M.D. driving, the Mercedes pulled out of the parking lot but, as officers followed, it immediately reentered the parking lot. When officers converged on the vehicle, defendant got out of the vehicle and attempted to walk away. Officers apprehended defendant about 15 feet from the vehicle.

Officers searched the Mercedes and found a .45-caliber Glock handgun with a loaded high capacity magazine.[1] The gun was found on top of the floor mat under the driver's seat. Because of the location of the seat control box under the driver's seat, a person in the rear seat could not have slid the gun forward underneath the seat.

Officers arrested defendant. While he was being processed, defendant asked if the driver of the vehicle (M.D.) also would be going to jail. Told that she probably would, defendant responded, "I don't even know [her]. It doesn't matter though. She's going to take it anyway."

Testimony of M.D. and N.T.

At trial, both M.D. and N.T. testified that N.T. had borrowed M.D.'s car on the day of the incident. N.T. initially testified that during the time she borrowed the car, she had allowed a male friend named "Erocka" to drive the car. However, on cross-examination, N.T. admitted she and a G-Mobb gang member had concocted the story about Erocka to attempt to explain how the gun might have been placed in the car.

M.D. and N.T. denied that the gun found in the Mercedes belonged to defendant and claimed not to know how the gun got in the car. M.D. admitted, however, that she had a romantic relationship with defendant and, at one time, had planned to marry him.

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[1] Officers also searched the Infiniti and located a loaded .40-caliber Glock handgun partially under the front passenger seat. Both the firearm found in the Mercedes and the firearm found in the Infiniti were examined and found to be operable. No identifiable fingerprint or DNA was found on either gun.

N.T. similarly described defendant as a "[c]lose friend" and "like a brother to [her]." N.T. admitted that she wrote an e-mail to defendant in jail vowing to do "whatever I can for you . . . no questions asked."

Recorded jail conversations

During trial, the prosecution played several recorded jail conversations involving defendant, N.T., and M.D.

In one call, recorded shortly after the incident, an unidentified female told N.T. that defendant should take responsibility for the gun rather than let M.D. do so: "[H]e should have been like that's not hers. That's mine."[2] N.T. responded, "Exactly. Like how you gonna let her get locked uh, arrested for something that yours? What the fuck? If you're fucking riding around with a gun, you need to be prepared to fucking take that charge because I know I'm not."

In another call, recorded later that night, defendant told N.T. that M.D. needs to "[k]eep her mouth shut." N.T. remarked, "They already knew we was lying though," to which defendant responded, "Yeah I know."

On December 17, 2016, defendant was recorded telling G.K. that he wished he had cut off his ankle monitor. He complained: "[The police] want me to be in jail or they want me to get killed. 'Cause either you want me to have it on me so you can take me to jail or you want me to not have it on me so one of these niggas could blow me."

A couple of weeks later, N.T. was recorded discussing the incident with an inmate. N.T. told the inmate that just before officers converged on the Mercedes, defendant said, " '[G]rab it, grab it.' And I'm lookin' back like, 'Shit.' I can't fuckin' do shit 'cause these motherfuckin police is already lookin' at me." N.T. then continues to tell the

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[2] Defendant called N.T. when she was on another call, initiating a three-way call. The conversation between N.T. and the unidentified female continued to be recorded after defendant hung up.

inmate, "But the fucked up part about it, the only thing that might fuck him off a little bit is it was the same one that he . . . just did a video to. He did a video to one of his songs and it's the same motherfuckin' shit that was in that video." On cross-examination, N.T. admitted that her statement about the video was referring to guns.

Gang evidence

Detective Kenny Shelton, a gang expert who was assigned to the gang suppression unit of the Sacramento County Sheriff's Department, testified that defendant was a validated member of the G-Mobb gang and various subsets that align with that gang. He testified that the primary activities of the G-Mobb gang include robberies, assaults with a deadly weapon, gun charges, drive-by shootings, and homicide. He also testified that gang members often use females to rent houses, buy vehicles, or hide firearms.

Detective Shelton explained that modern gangs engage in "net banging" by posting rap videos that disrespect and advocate violence towards rival gangs. Such videos often provoke violence. Defendant appeared in several "net banging" videos recorded before his arrest on December 15, 2016.

One video, entitled "No Air," was published on December 14, 2016, the day before defendant's arrest. In the "No Air" video, defendant raps about harming rival gang members. The video depicts defendant holding what appear to be Glock handguns with extended magazines, similar to the firearm found in the Mercedes. Detective Shelton testified that posting the video increased the likelihood that defendant would need to be armed to protect himself from retaliation from rival gang members.

Detective Shelton testified that December 15, the day defendant was arrested, is known as "Yeet Day," which is an honored day in G-Mobb culture because it is the anniversary of the death of a prominent member of the gang. On Yeet Day, gang tensions run high and there is an increased likelihood of firearm possession and gang violence.

Detective Shelton also testified that at the time of the offense in this case there was an active gang war between G-Mobb and the Oak Park Bloods. Due to the gang war, G-Mobb members usually were armed. In a recorded jail call, defendant stated that he is not going to get "caught slippin'," meaning caught without a gun by a rival gang member.

Verdict and sentencing

The jury found defendant guilty of one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)—count one)[3] based on the .45-caliber Glock found in the Mercedes. The jury found true the special allegation that defendant carried a firearm or had a firearm available for use during the commission of the offense. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The jury also found true the special allegation that defendant committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

In a bifurcated proceeding, the trial court found true the allegation that defendant had been convicted of two prior serious felonies that qualified as strikes under the three strikes law. (§§ 667, subds. (a)(1), (e)(2), 1170.12, subd. (c)(2).)[4]

The court sentenced defendant to 25 years to life in prison under the three strikes law, with a consecutive five-year sentence for the prior serious felony enhancement. The court also imposed a four-year sentence for the gang enhancement, to be served concurrently, for a total aggregate term of five years plus 25 years to life in prison.

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[3] Further undesignated statutory references are to the Penal Code.

[4] The parties stipulated that defendant had been convicted of a felony.

DISCUSSION

I

Sufficiency of the Evidence

Defendant argues there is insufficient evidence to support his conviction for possession of a firearm under section 29800, subdivision (a)(1). We disagree.

When considering a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) We resolve all conflicts in the evidence and draw all reasonable inferences in support of the conviction. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.) A judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The issue here is whether there is substantial evidence to prove defendant possessed or controlled the firearm found beneath the driver's seat in the Mercedes. To sustain a conviction, it is not necessary to show the defendant had actual physical possession of a firearm. A conviction may be based on constructive possession, which is established if the defendant knowingly exercised a right to control, either personally or through another. (*People v. White* (2014) 223 Cal.App.4th 512, 524; *People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) Possession need not be exclusive, and even transitory possession may be enough to establish a violation. (See *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1036; *People v. Neese* (1969) 272 Cal.App.2d 235, 245.)

Here, there is substantial evidence in the record to support a finding that defendant possessed the gun found in the Mercedes. On the day of the incident, December 15, 2016, defendant's girlfriend G.K. called 911 and reported that defendant was carrying a

handgun. Law enforcement officers then tracked defendant using his GPS monitor, first to a house belonging to the family of a deceased gang member, and then to the restaurant parking lot where defendant was arrested.

Although no one testified to seeing defendant handle a gun, officers observed defendant lean into the driver's side window of the Mercedes before he got into the vehicle. In addition, because the windows of the vehicle were tinted, officers were unable to see anything that defendant may have done after he got into the Mercedes. A jury reasonably could infer that defendant either placed the gun under the seat before getting into the vehicle or that he passed or tossed the gun forward after getting into the vehicle.

The gang evidence further supports an inference that defendant possessed or controlled the firearm found in the Mercedes. Detective Shelton testified that defendant was a validated member of the G-Mobb gang, and that the primary activities of that gang include crimes involving firearms. Further, due to an active gang war, G-Mobb members almost always carried firearms, and often used females to hide those firearms.

Detective Shelton also testified that the day of the incident, December 15, known as "Yeet Day," is an honored day in G-Mobb gang culture, on which tensions run high and there is an increased likelihood of gang violence and gun possession. In addition, on December 14, the day before the incident, defendant posted the "No Air" net banging video. Detective Shelton testified that posting the video increased the likelihood that defendant would need to be armed to protect himself from rival gang members.[5] In the video, defendant appears to be holding a Glock handgun with an extended magazine, similar to the gun found in the Mercedes.

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[5] In a recorded jail call, defendant expressly referred to not getting "caught slippin'," meaning caught without a gun by a rival gang member.

The recorded jail conversations also reasonably support an inference that the firearm found in the Mercedes belonged to defendant and that defendant used M.D. to hide the firearm (or at least allowed her to take responsibility for it).

In a call recorded later in the evening on the day of the incident, N.T. agreed with an unidentified female who said that defendant should take responsibility for the gun rather than let M.D. do so: "Exactly. Like how you gonna let her get locked uh, arrested for something that yours? . . . If you're fucking riding around with a gun, you need to be prepared to fucking take that charge . . . ."

Later that same night, defendant told N.T. that M.D. needs to "[k]eep her mouth shut." When N.T. remarked, "They already knew we was lying though," defendant responded, "Yeah I know."

On December 17, 2016, defendant was recorded telling G.K. that: "[The police] want me to be in jail or they want me to get killed. 'Cause either you want me to have it on me so you can take me to jail or you want me to not have it on me so one of these niggas could blow me." This statement reasonably could be construed as referring to a firearm.

A few weeks after the arrest, N.T. was recorded telling an inmate that during the incident defendant yelled at her to " 'grab it, grab it,' " but she couldn't because the car door was open and law enforcement officers could see her. N.T. then continues to tell the inmate, "But the fucked up part about it, the only thing that might fuck him off a little bit is it was the same one that he . . . just did a video to." N.T. admitted that her statement about the video was referring to guns, thereby implying that the gun found in the Mercedes is the same gun depicted in the net banging video.

Viewing the evidence in the light most favorable to the jury's finding, we conclude substantial evidence supports the jury's finding that defendant possessed the firearm.

II

Cruel and/or Unusual Punishment

Defendant argues that the indeterminate sentence imposed on him for being a felon in possession disproportionately punishes him in violation of the state and federal prohibitions against cruel and unusual punishment. We find no constitutional violation.

Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. Although the state and federal prohibitions are not coextensive,[6] there is considerable overlap between them. The touchstone for each is "gross disproportionality." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82; *People v. Baker* (2018) 20 Cal.App.5th 711, 733; see also *In re Lynch* (1972) 8 Cal.3d 410, 424; *Ewing v. California* (2003) 538 U.S. 11, 20-21 [155 L.Ed.2d 108, 117] (*Ewing*) (lead opn. of O'Connor, J.); *Graham v. Florida* (2010) 560 U.S. 48, 59-60 [176 L.Ed.2d 825, 835-836].)

The California Supreme Court has emphasized the " ' "considerable burden" ' " that a defendant must overcome in challenging a penalty as cruel or unusual. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.) The length of a sentence is largely a matter of legislative prerogative, and courts have held that a sentence will not be found to be unconstitutional except in "the rarest cases." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193; *Ewing, supra,* 538 U.S. at p. 21.)

Defendant has failed to meet his burden to show the sentence he received is unconstitutionally cruel or unusual. Defendant's argument is premised on the disparity

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[6] The Eighth Amendment to the United States Constitution is phrased in the conjunctive, prohibiting punishments that are "cruel and unusual," whereas the California Constitution is phrased in the disjunctive, prohibiting punishments that are "cruel or unusual." (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

between the sentence he received (30 years to life) and the ordinary maximum term for a violation of his current offense (three years). (§ 1170, subd. (h).)

However, defendant is not being punished solely because of his current offense. He also is being punished because of his cumulative record as a recidivist offender previously convicted of prior serious or violent felonies under the state's three strikes law. Courts almost uniformly have rejected claims that mandatory indeterminate sentences imposed under the three strikes law constitute cruel or unusual punishment. (See, e.g., *People v. Cooper* (1996) 43 Cal.App.4th 815 [upholding sentence of 25 years to life for felon in possession of firearm]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084 [upholding 25-year-to-life term for commercial burglary and petty theft with a prior]; *People v. Barrera* (1999) 70 Cal.App.4th 541 [upholding 25-year-to-life term for check forgery]; *People v. Cortez* (1999) 73 Cal.App.4th 276 [upholding 25-year-to-life term for felon in possession of firearm]; *Ewing, supra*, 538 U.S. 11 [upholding 25-year-to-life term for felony grand theft]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [155 L.Ed.2d 144] [upholding two 25-year-to-life terms for two counts of petty theft with a prior].) The "rare case" finding a sentence to be cruel or unusual typically involves a long sentence imposed for a largely passive, technical violation of the law, such as failure to timely update a sex offender registration. (See *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1077, 1084.)

Considering the lengthy and serious nature of defendant's criminal history,[7] as well as the nature of his current offense—possession of a firearm by a felon, with a gang enhancement—we conclude that defendant's sentence is neither cruel nor unusual punishment.

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[7] Defendant has adult convictions for resisting a peace officer (twice), assault with a firearm, and carrying a concealed weapon in a car (with a gang enhancement), as well as multiple juvenile adjudications.

III

Relief in Case No. C083426

In case No. C083426, defendant separately appealed his 2016 conviction for felony possession of a concealed firearm, which conviction formed the basis for one of defendant's two prior strikes at issue here under the three strikes law. Defendant argues that if he is granted relief in the other case, we must vacate his conviction and remand for a new determinate sentence.

This court has affirmed the judgment in case No. C083426. Accordingly, we find defendant's argument to be moot.

IV

Senate Bill No. 1393 (2017-2018 Reg. Sess.)

Under the law in effect at the time of defendant's sentencing, the trial court had no authority to strike a prior serious felony conviction for purposes of the five-year enhancement of a sentence under section 667, subdivision (a)(1). (Former § 667, subd. (a)(1); former § 1385, subd. (b).) Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect during the pendency of this appeal, amended the law to permit a trial court judge to strike a five-year serious felony prior. (§§ 667, subd. (a)(1), 1385.)

Defendant argues that the amendment applies retroactively to this case and, as a result, we must remand this matter to the trial court to allow it to exercise its discretion whether to strike the five-year serious felony prior enhancement. The People agree, and so do we. We conclude the amendments made by Senate Bill No. 1393 apply retroactively to defendant's case and therefore we must remand unless the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken the enhancement even if it had the discretion. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 ["it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases . . . not yet final when Senate Bill 1393 [became] effective on January 1, 2019"]; *People v. McDaniels* (2018)

22 Cal.App.5th 420, 425.) The record here contains no such evidence. We thus remand to allow the trial court to exercise its newly granted discretion, while expressing no opinion as to how the trial court should exercise that discretion.

DISPOSITION

The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to consider whether the five-year serious felony enhancement under Penal Code section 667, subdivision (a)(1) should be stricken. In all other respects, the judgment is affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

HOCH, J.